UNITED NATIONS

AT

Administrative Tribunal

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21 November 1996

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 790

Case No. 873: AKIL

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Luis de Posadas Montero, Vice-President, presiding; Mr. Francis Spain; Ms. Deborah Taylor Ashford;

Whereas, at the request of Akil Eisa M. Akil, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended to 31 August 1995, the time-limit for the filing of an application to the Tribunal;

Whereas, on 24 August 1995, the Applicant filed an application requesting the Tribunal, inter alia:

"...

(a) To rescind the decision of the Secretary-General rejecting the Applicant's candidacy for the D-2 post of Deputy Executive Secretary of ESCWA [United Nations Economic and Social Commission for Western Asia];

(b) To order that the Applicant's candidacy for promotion to the D-2 level be given proper consideration;

...

(f) To find and rule that the selection process for the D-2 post of Deputy Executive Secretary was improperly motivated, tainted by extraneous considerations and marred by irregularities in procedure;

(g) To award the Applicant appropriate and adequate compensation to be determined by the Tribunal for the actual, consequential and moral damages suffered by th Applicant as a result of the Respondent's actions or lack thereof;

(h) To fix [pursuant] to article 9, paragraph 1 of the Statute and Rules, the amount of compensation to be pa in lieu of specific performance at three years' net ba pay, in view of the special circumstances of the case;

(i) To award the Applicant as costs the sum of $6,000.00 i legal fees and $500.00 in expenses and disbursements."

Whereas the Respondent filed his answer on 15 December 1995

Whereas the Applicant filed written observations on 22 January 1996;

Whereas, on 21 October 1996, the presiding member of the panel ruled that no oral proceedings would be held in the case;

Whereas, on 28 October 1996, the Tribunal requested the Respondent to provide it with answers to certain questions, which did, on 31 October and 5 and 6 November 1996;

Whereas the facts in the case are as follows:

The Applicant joined the service of the Organization on 1 April 1974, on a three-month fixed-term appointment as a Researc Assistant in the Agriculture Unit of ESA, Economic and Social Commission for Western Asia (ESCWA), Lebanon, at the GS-6, step I level. His appointment was extended for three month periods, unti 1 January 1975, when he was given the post of Associate Social Affairs Officer, at the P-2, step I level, in the Social Developme and Human Settlement Division of ESCWA. On 1 June 1975, his appointment became probationary and, on 1 January 1977, permanent. On 1 April 1978, his functional title was changed to Social Affair Officer, and on 1 April 1981, he was promoted to the P-4 level. H was transferred to Iraq with effect from 1 May 1982. On 1 October 1986, he was promoted to the P-5 level, and on 1 April 1991, he wa

transferred to Amman, Jordan, and reassigned to the Programme Planning and Coordination Division (PPTCO). On 1 September 1992, the Applicant was promoted to the D-1 level, as Chief of PPTCO. On 31 March 1994, he became Chief of the Social Development Division at ESCWA.

On 16 November 1991, the post of Deputy Executive Secretary, ESCWA, became vacant. A vacancy announcement No. 91-E-ECW-067-BG, with a 27 January 1992 deadline for submission of applications from both internal and external candidates, was circulated. The announcement included the remark "Qualified women are encouraged to apply."

On 28 July 1993, the Acting Chief, Personnel, forwarded to the Chief of Administration, ESCWA, "the list of possible candidates for the post of Deputy." The list included D-1 staff members of ESCWA ranked by seniority in grade, together with copies of their fact sheets. The list was as follows:

"Name	In Grade Since	Current Level and Step
...	10/1987	D-1/VI
...	10/1987	D-1/VII reach age of retirement in December
...	10/1989	D-1/IV
...	9/1991	D-1/VIII
[the Applicant]	9/1992	D-1/IV
[Ms. X]	1/1993	D-1/IV"

Added also was the name of the Chief of the Joint Food and Agriculture Organization (FAO)/ESCWA Agriculture Division, an FAO staff member at the D-1 level.

On 5 August 1993, the Executive Secretary, ESCWA, sent a memorandum to the Secretary-General in which he proposed three candidates for the D-2 post, listed in order of preference: The Applicant (D-1, step IV), Ms. (X) (D-1, step IV) and Mr. (Y) (D-1, step II). An evaluation of the Applicant was appended.

On 5 September 1993, in response to a request from the Office of Human Resources Management (OHRM), the Acting Chief of Personnel

forwarded the Executive Secretary's evaluations of Ms. (X) and Mr. (Y). She also sent an evaluation of the former Deputy Executive Secretary, whose name the Executive Secretary wished to add to the list.

On 20 September 1993, in response to a further request, the Acting Chief of Personnel transmitted to OHRM copies of fact sheets, performance evaluation reports (PERs) and other relevant documentation of Ms. (X) and the Applicant, as well as copies of the former Executive Secretary's fact sheet, P-11 and curriculum vitae (C.V.), and copies of Mr. (Y)'s probationary performance appraisal report and C.V. The next day, she forwarded to Headquarters a further evaluation of the Applicant.

By cable of 7 October 1993, the Director of Personnel, OHRM, informed the Executive Secretary that the Secretary-General had decided to appoint Ms. (X) as Deputy Executive Director.

Meanwhile, the Applicant had come into possession of a copy of a handwritten, undated note, apparently written by the Acting Chief of Personnel. The note, entitled "Ms. X", says that Ms. (X)'s promotion to D-1, shown in the fact sheet as 16 January 1993, should be corrected to 1 February 1993, and that other corrections needed to be made to her steps in grade. The note concludes: "to redo the whole thing after her selection to D-2 ..."

On 3 November 1993, the Applicant requested the Secretary-General to review the decision of 7 October 1993 not to select him for the D-2 post of Deputy Executive Secretary of ESCWA.

On 4 February 1994, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The JAB adopted its report on 2 February 1995. Its considerations, conclusions and recommendations read, in part, as follows:

"Considerations

...

15. In this context, the Panel first considered whether there was any evidence of bias or discrimination against the Appellant. The Panel felt that, if there had been obvious disparity in qualifications as between Ms. [X] and the Appellant, this might have been considered as evidence to support the latter's allegations. In the Panel's view, there was no such disparity; both candidates appeared, on the record, to be qualified. Having reviewed the material submitted by, or on behalf of, the Appellant, the Panel could find no evidence to support the allegations of bias or discrimination on the basis of gender or of nationality.

16. The Panel felt, however, that if the gender of the candidate to be selected for the post played a role in the selection, this should have been made clear by the Administration stating that it had decided to appoint a woman in the light of the policy established by the Secretary-General on the promotion of women to higher positions.

17. The Panel considered at somewhat greater length the role of [the Acting Chief, Personnel Section] and of her hand-written note. It noted that the 'misinformation' supplied to [the Executive Secretary] and, ultimately, to Headquarters by [the Acting Chief, Personnel Section] concerned the date of Ms. [X]'s promotion to D-1 and her periods of leave without pay. The promotion date was given in ESCWA's own files as being one month earlier than it was in fact; the earlier date was that used by [the Acting Chief, Personnel Section]. The Panel concluded that one month discrepancy and the short period of LWOP [leave without pay] were too trivial to have had any impact on an evaluation of a candidate's qualifications for a senior post.

18. As to the significance of the final phrase in [the Acting Chief, Personnel Section]'s note (...), the Panel took the common sense view that [the Acting Chief, Personnel Section] was too junior to be in a position to predict the outcome of the Secretary-General's review. The Panel thus found no evidence to support the Appellant's conspiracy theory, no proof of extraneous considerations having entered into the evaluation of the candidates, and no reason to believe that the Secretary-General had abused his discretionary powers. The Panel also reviewed the material submitted to the Senior Review Group under cover of [the Director of Personnel, OHRM]'s memorandum of 24 September 1993 and found no evidence that relevant information concerning the Appellant and the other candidates had been omitted or misrepresented.

...

Recommendations

20. The Panel was troubled, not only by the substance of the appeal, but by the manner of its presentation by, and on behalf of the Appellant. It noted the unusually strong language in the Respondent's reply, and recommends that the Secretary-General take appropriate action to avoid a repetition in the future.

21. The Panel makes not other recommendation with respect to this appeal."

On 2 March 1995, the Under-Secretary-General for Administration and Management informed the Applicant as follows:

"The Secretary-General has examined your case in the light of the Board's report. The Secretary-General has taken note of the Panel's findings on the substance of your appeal and has decided, accordingly, to maintain the contested decision and to take no further action on your case. The Secretary-General shares the Panel's concern expressed in paragraph 20 of its report and will bring it to the attention of the appropriate office for action as necessary."

On 24 August 1995, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Applicant was denied full and fair consideration for promotion.

2. The selection process for the post in question was improperly motivated, tainted by extraneous considerations and marred by irregularities in procedure.

Whereas the Respondent's principal contentions are:

1. The Applicant has no right to promotion, but only a right to consideration for promotion. The Applicant was properly

considered for promotion, and his rights were not violated because he was not selected for the post in question.

2. The decision not to select the Applicant for the post in question was not vitiated by extraneous factors.

The Tribunal, having deliberated from 24 October to 21 November 1996, now pronounces the following judgement:

I. The Applicant claims that he was not fully and fairly considered for the post of Deputy Executive Secretary of ESCWA and requests rescission of the decision to appoint another candidate to that position.

The Applicant also submits that prior to the selection process, the Administration had already decided to appoint a given candidate who did not meet the requirements for the post as set forth in the vacancy announcement.

The Tribunal requested a copy of the "records, minutes or reports of the Senior Review Group, which made recommendations to the Secretary-General on the candidature for the post of Deputy Executive Secretary" of ESCWA. These documents were examined by the Tribunal. It is satisfied that the Applicant's candidature was fully and fairly considered.

In particular, the Tribunal noted the report of the Senior Review Group, dated 24 September 1993, stating that "both [the Applicant] and Ms. [X] were qualified for the post". This clearly shows that the Applicant's candidature was not overlooked.

II. The Tribunal, in its Judgement No. 447, Abbas (1989), ruled that the onus probandi that a given candidate has been fully and fairly considered for a post rests with the Administration. The Tribunal finds that, in this instance, the Administration has discharged its obligation.

The report of the Senior Review Group recommends the female staff member on the basis of the need to "increase the representation of women at the senior level". The Tribunal finds that such a recommendation is in conformity with the general policy of the United Nations. Consequently, the Applicant cannot claim that his rights were violated.

III. The Applicant also claims that, as early as April 1993, the Secretary-General intended to appoint an Arab woman to the post and that the "the Secretary-General's intention was made known to [the] Chief of the Division of Administration at ESCWA ... and to [the] Executive Secretary of ESCWA". The Tribunal also noted the assertion that "... [the then Director of Personnel, OHRM,] had told [the Executive Secretary], in the presence of ... [the then Information Officer at ESCWA] that he had since identified ... [the Chief of the Division of Social Development and Population at ESCWA] as the most suitable Arab female candidate". In order to ascertain the accuracy of these allegations, the Tribunal requested written testimony from the persons mentioned by the Applicant.

The former Director of Personnel denied having been present at the meeting referred to by the Applicant. The Information Officer at ESCWA did not recall the episode. The Executive Secretary asserts that the Director of Personnel never transmitted any suggestion from the Secretary-General. Finally, the Director of Personnel testified that "it is not true that I 'gave advice' to [the Executive Secretary] that 'the Secretary-General wanted a female Arab candidate for the D-2 post' although he also adds that he did emphasize that "in filling the vacant D-2 post every effort should be made first to find a woman candidate ..."

IV. In the view of the Tribunal, these statements, even if they show that there existed a certain preference for a female candidate, are not sufficient to offset the evidence that the Applicant was

fully and fairly considered for the post. They also show that the post was not awarded to the female candidate as a result of prejudice or any other extraneous motive.

V. The Applicant further claims that the selected candidate fell short of the requirements of the vacancy announcement, as her curriculum vitae did not show that she held an "advanced university degree in the field of economics or business administration".

In this respect, the Tribunal notes that, for the requirement of an advanced university degree, there can be substituted, in the words of the vacancy announcement, a "relevant specialty such as international relations with substantial emphasis on economics", a requirement that the other candidate met, according to her curriculum vitae.

VI. For the foregoing reasons, the Tribunal rejects the application in its entirety, including the Applicant's request for costs.

(Signatures)

Luis de POSADAS MONTERO
Vice-President, presiding

Francis SPAIN
Member

Deborah Taylor ASHFORD
Member

New York, 21 November 1996

R. Maria VICIEN-MILBURN
Executive Secretary